

In the Matter of the Petition for)	
Termination of Probation of:)	
)	
JOSEPH NICHOLAS CAREY, M.D.)	Case No. 800-2017-038678
)	
Physician's and Surgeon's)	OAH Case No. 2019030769
Certificate No. A87082)	
)	
Respondent)	
)	

IT IS SO ORDERED August 9, 2019.

By: Ronald H. Lewis, MD
 Ronald H. Lewis, M.D., Chair
 Panel A

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
STATE OF CALIFORNIA

In the Matter of the Petition for Termination
of Probation of:

JOSEPH NICHOLAS CAREY, M.D.,
Physician's and Surgeon's Certificate
No. A 87082,

Petitioner.

Case No. 800-2017-038678

OAH Case No. 2019030769

PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on June 12, 2019, in Los Angeles, California.

Keith Carlson and Cathy Nichols, Attorneys at Law, represented petitioner Joseph Nicholas Carey, M.D., who was present.

Jonathan Nguyen, Deputy Attorney General, appeared under Government Code section 11522.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on June 12, 2019.

FACTUAL FINDINGS

1. Petitioner filed a Petition to Terminate Probation, dated November 18, 2017.
2. On May 7, 2004, the Board issued Physician's and Surgeon's Certificate number A 87082 to petitioner. The certificate is scheduled to expire on May 31, 2020.
3. On November 10, 2014, the Board's executive director filed an Accusation against petitioner in case number 11-2013-229347, stating four causes for discipline, i.e., conviction of a crime (driving under the influence of alcohol causing bodily injury, a felony), use of alcohol in a dangerous or injurious manner, unprofessional conduct, and violation of the Medical Practice Act.

4. The Accusation set forth the following factual allegations:

a. On January 8, 2014, respondent pled nolo contendere to and was convicted of violating Vehicle Code section 23152, subdivision (b) (driving while having a 0.08 percent or higher blood alcohol content, causing bodily injury to three persons), a felony. The court suspended imposition of sentence and placed respondent on three years' formal probation on terms and conditions including that he serve five days in county jail with credit for one day served, cooperate with the probation officer in a rehabilitation plan, enroll in and complete an alcohol and drug education program, perform 500 hours of community service, pay fines, penalties, and fees, and make restitution to the victims.

b. The circumstances leading to the conviction were that, on December 22, 2012, at 12:40 a.m., after working for 36 hours straight and then drinking alcoholic beverages at a Christmas party, petitioner was driving home in an eastbound lane, fell asleep, and drove into a westbound lane, where he collided head-on with a motorcycle and then with another automobile, severely injuring the motorcyclist and occupants of the other automobile.

5. On August 17, 2015, the Board issued a Decision, effective September 16, 2015 (Decision), adopting a Stipulated Settlement and Disciplinary Order signed by petitioner. The Stipulation recites that petitioner "admits the truth of each and every charge and allegation in Accusation No. 11-2013-229347." (Ex. 4, p. 55.) For purposes of this hearing, therefore, those charges and factual allegations (see Factual Findings 3 and 4, above), are deemed true, correct, and admitted.

6. The Decision revoked petitioner's certificate, stayed the revocation, and placed petitioner on probation for five years on various terms and conditions, including requiring that he abstain from personal use or possession of controlled substances other than medications lawfully prescribed to him by another physician; abstain from alcohol use; submit to biological fluid testing; enroll in a professionalism program (ethics course); undergo a psychiatric evaluation; undergo and continue psychotherapy treatment with a Board-approved provider; and submit quarterly declarations of compliance with probation. The biological fluid testing requirement (condition 3) provides that petitioner must contract with an approved laboratory or testing service and cooperate with a random biological fluid testing program. The quarterly compliance declarations requirement (condition 10) provides that petitioner "shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter." (Ex. 4, p. 61.) Probation is scheduled to terminate in September 2020.

7. At hearing, petitioner confirmed his admission of the truth of the charges and allegations leading to his probation. He has never before or since December 2012 been arrested for driving under the influence. He has not consumed any alcohol in the six and one-half years since the accident. He voluntarily reported the accident and his arrest to the Board and fully cooperated with the Board's investigation. He took urine tests in early 2013, before the Accusation was filed, at the Board's request.

8. Soon after the accident, petitioner met with a psychiatrist, John N. Donlou, M.D., because he was terrified and anxious about what he had done and how it could affect him, his family, and his trainees and patients. He continued to see Dr. Donlou regularly in compliance with the psychotherapy condition of his probation, until the Board terminated the psychotherapy requirement in March 2017. In a quarterly report dated December 17, 2016, and a letter to the Board dated January 16, 2017, Dr. Donlou recommended that the Board terminate petitioner's mandated psychotherapy, finding that petitioner was safe to practice medicine. He based his finding on several facts, including that (a) Linda Rever, M.S., Chair of the Medical Staff Advisory Committee at Keck Medical Center at the University of Southern California, who was familiar with the fact that Dr. Donlou was treating petitioner, never contacted him with any concern about petitioner's ability to practice medicine; (b), in a Psychiatric Evaluation dated October 15, 2015, Nathan E. Lavid, M.D., found no evidence of a psychiatric disorder. Dr. Donlou continued that,

in the past year, [petitioner] has never demonstrated evidence of impaired thinking, abnormal mood, excessive anxiety or behavior that would impact his ability to practice medicine safely. [¶] Like Dr. Lavid, I have no evidence to make an alcohol or substance abuse diagnosis, past or present. [¶] Lack of psychiatric and substance abuse disorders make an even stronger case [for petitioner] for being a safe physician. I have worked with [petitioner] since 2013 and he shows no signs of a character disorder that would lead to poor or impulsive judgment in medical decisions and practice. [¶] . . . [¶] [Petitioner] has shown me consistent attributes of integrity, conscientiousness and commitment in his attendance to our meetings, his serious use of our time together and an openness and honesty about himself. These qualities have been discussed in my quarterly reports.

(Ex. 14, pp. 154-156.)

9. In a letter to the Board dated April 13, 2017, Dr. Donlou wrote that "There is no psychiatric diagnosis. No need for psychotropic medication. Continued therapy is not indicated for the incident that brought [petitioner] to the Medical Boards' attention." (Ex. 14, p. 152.) By letter dated March 15, 2017, Regina Armstrong, Probation Inspector for the Board, terminated the psychotherapy probation condition. (Ex. P14.)

10. Petitioner discussed with Dr. Donlou steps petitioner could take to prevent a repetition of the incident. Petitioner also explored his personal relationship with alcohol through Alcoholics Anonymous (AA) and discussions with other doctors, and concluded that, for him, alcohol consumption is unsafe. Petitioner learned that any problem with alcohol is a personal one, not related to how much or how often drank. He attended AA voluntarily for over two years. He rarely drank before the accident, maybe once per month, and never before work,

but just went out one night and made a horrible decision. This, for petitioner, was enough evidence he should not consume alcohol and, since the accident, petitioner has not consumed any alcohol. He has never been diagnosed with a substance abuse problem.

11. Petitioner performed 500 hours of community service in compliance with the terms of his criminal probation, at the Institute for Global Orthopedics and Traumatology and at Homeboy Industries. He remained involved with Homeboy Industries for years, providing, e.g., free tattoo removal from 2014-2017, and getting an industry sponsor to give Homeboy Industries a good price on a better tattoo removal machine.

12. Petitioner was sued civilly by a party he injured, in November 2013. Petitioner settled the case one month after it was filed, thereby making restitution to that party before he was convicted.

13. Petitioner completed all terms of his criminal probation. On February 23, 2015, the court reduced petitioner's conviction to a misdemeanor and converted the remainder of the three-year probationary term to non-reporting summary probation. Robert F. Wallace, Deputy District Attorney, represented to the court on that date that "I do believe this was an aberrational event and is not something that is characteristic of either a previous or ongoing problem that [petitioner] has, but merely a tragic one-time event." (Ex. 11, p. 2.) The court stated, "I agree that this is not the result of an issue of substance abuse," but was the result, rather, of "a very uncharacteristic choice" of petitioner's. (Ibid.) On March 25, 2016, the court terminated probation, set aside and vacated the plea and entered a plea of not guilty, and dismissed the case under Penal Code 1203.4. The judge called it an aberrational event. (Ex. 12, pp. 2-3.) Petitioner notified the Board that the criminal case had been dismissed.

14. After the Board issued its Decision, the Medical Executive Committee and the Well-Being Committee at Keck Medical Center evaluated petitioner's criminal conviction and Board discipline and agreed to allow petitioner to retain his privileges, as did the same committees at Los Angeles County Hospital. Petitioner allowed Dr. Donlou to communicate with the committees directly, finding it a helpful adjunct that the people he worked with knew what had happened.

15. Petitioner has completed all the terms of his Board probation. He submitted to a psychiatric evaluation by Nathan E. Lavid, M.D., a clinical and forensic psychiatrist. Dr. Lavid prepared a comprehensive psychiatric evaluation report for the Board, dated October 15, 2015. Dr. Lavid reviewed documents and applied various testing instruments, and took a urine sample for drug and alcohol testing. Dr. Lavid reported to the Board that petitioner is not a danger to himself, patients, or the public, that his ability to practice medicine safely is not impaired by mental or physical illness, and that, with psychotherapy, "there are no mental health limitations for petitioner to function as a physician in a manner conducive to public safety." (Ex. P19, p. 2.) Petitioner completed a professionalism program and his continuing education requirements, and has paid all probation and testing costs.

16. To comply with probation condition 3, petitioner was required to check in daily before 5:00 p.m. with the testing service, First Source. He generally checked in in the morning, using alarms as a system to remember, but sometimes his routine failed. He checked in late six times in the past three and one-half years. Each time he was late, he checked in within one hour of the deadline; moreover, each time he was late, he traveled to the laboratory and submitted a sample for testing, whether or not he had been selected for testing. On each occasion, he notified Inspector Virginia Armstrong that he had checked in late. On one occasion, October 8, 2016, petitioner was traveling in a different time zone, and had notified Ms. Armstrong, who assured him he would not be tested until he came back, when he did, in fact, submit to a test. Petitioner has never tested positive for alcohol or illegal substances.

17. To comply with condition 10, petitioner always signed and sent his quarterly reports to Ms. Armstrong before the 10th of the month following the end of each quarter, with one exception, the first quarterly report of 2018, which he signed and sent on April 18, 2018, eight days late. He testified he forgot to send that one, and that it was an honest mistake. On a few occasions, Ms. Armstrong called to confirm petitioner had sent his quarterly report because she had not yet received it; on each such occasion except April 2018, petitioner had already mailed the report. The Deputy Attorney General argued that the probation term requires that the Board *receive* quarterly reports by the 10th day of the month following the quarter. The text of the probation term lends no support to such an interpretation. It requires only that the probationer submit the declaration by the 10th calendar day of the following month. If the Board had wanted to make the 10th day the deadline for receipt, it could have done so explicitly.

18. Since September 2015, petitioner has gotten married and had two children, moved and bought a house. Sobriety is not an issue; not drinking does not affect his life. He testified that he was grateful to the Board for allowing him to keep practicing, that probation was a gift, and that it was paramount to him to complete its terms. He feels he has accomplished the goals of probation. But it is difficult to keep up with the testing regimen, which involves waiting on line for three and one-half hours to test while his wife cares alone for the two babies at home. On the other hand, petitioner uses the fact of his probation in counseling his residents, and in discussions with colleagues and students. It has made him prioritize things in his life, because so many people depend on him personally and professionally. He has been promoted and given increased professional responsibilities since being on probation, which he attributes into the insights he has gained into how to recover from errors. He informed many of his colleagues about the conviction and probation, and they have been supportive.

19. Petitioner urged that the incident leading to his conviction was an aberrant event, that he has been alcohol free for almost seven years and has not had any positive tests while on probation, that there is no danger of recurrence, and that a small error rate on checking in for testing, when he tested on those occasions anyway whether required to or not, warrants early termination of probation.

20. Petitioner submitted numerous character reference declarations, signed under penalty of perjury. Brad Selby, Chief Administrative Officer of the Department of Surgery at USC Keck Medical Center and the father of a patient of petitioner's, wrote that petitioner has been an example of someone taking full responsibility for what they have done. Linda Rever, M.D., Chair of the Medical Staff Advisory and Physician Well Being Committee at Keck Hospital at USC, wrote that petitioner has consistently demonstrated sincere engagement and compliance with the committee's monitoring program and has exhibited insight and self-awareness. Lori K. Howell, M.D., Assistant Professor in the Plastic and Reconstructive Surgery Division at USC Keck School of Medicine, and Director of Plastic Surgery at the Los Angeles County Hospital, wrote that petitioner "inspires and teaches young professionals the work ethic and the moral values needed to thrive in the profession." (Ex. 40.) Mark Urata, M.D., D.D.S., petitioner's supervisor and Chief of the Division of Plastic and Reconstructive Surgery at USC Keck School of Medicine, and Division Head of Plastic and Maxillofacial Surgery at Children's Hospital in Los Angeles, wrote of petitioner's "growth as an individual and a physician. It is evident that he has taken the personal introspection seriously. He placed the importance of his work and desire to serve above the self-flagellation and pity that might have sunk his career. . . . Since the December 2012 accident, [petitioner] has shown his remorse and willingness to do what it takes to continue to serve in our division." (Ex. 41.) Warner Garner, M.D., a Professor and Director Emeritus of the Plastic Surgery Residency Program at the Keck School of Medicine at USC, wrote that petitioner was humble and embarrassed when he disclosed the event that led to his conviction, and is certain that the event was not reflective of an ongoing problem with drugs and alcohol.

21. As reflected in the documents accompanying the petition, petitioner's testimony, and the testimony of numerous witnesses in support of the petition, petitioner has addressed quite seriously the issues for which the Board disciplined him, transforming his life and his way of thinking. While he abused various substances over a period of at least five years, the actions he has taken to maintain his sobriety for over five years convincingly demonstrate that two additional years of probation will not appreciably reduce any risk of danger to the safety and welfare of the public or his patients. The record as a whole warrants termination of probation.

LEGAL CONCLUSIONS

1. Petitioner has established that it would be consistent with the public interest to grant early termination of his probation, by reason of Factual Findings 7 through 16.

2. Petitioner bears the burden of proving both his rehabilitation and his fitness to practice medicine. (*Housman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308.) The standard of proof is clear and convincing evidence. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1092; *Feinstein v. State Bar* (1952) 39 Cal.2d 541, 546-547.) Petitioner's burden required a showing that he is no longer deserving of the adverse character judgment associated

with the discipline imposed against his certificate. (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.) Petitioner has sustained his burden of proof.

3. The administrative law judge hearing the petition “may consider all activities of the petitioner since the disciplinary action was taken, the offense for which the petitioner was disciplined, the petitioner’s activities during the time the certificate was in good standing, and the petitioner’s rehabilitative efforts, general reputation for truth, and professional ability.” (Bus. & Prof. Code, § 2307, subd. (e).) The Board shall evaluate the petitioner’s evidence of rehabilitation considering the relevant criteria including the nature and severity of the acts for which the petitioner was disciplined; the time that has elapsed since commission of those acts; and evidence of rehabilitation submitted by the petitioner. (Cal. Code Regs, tit. 16, §1360.2.)

4. Protection of the public “shall be the highest priority” for the Board and administrative law judges in exercising their disciplinary authority. (Bus. & Prof. Code, § 2307, subd. (a).)

5. Petitioner has demonstrated by clear and convincing evidence that the public would not be endangered if he were granted full privileges of licensure. Mere compliance with the terms of probation for nearly four years would ordinarily be insufficient to demonstrate to the Board, which imposed a probationary term of five years, that petitioner can practice safely. Conviction of a crime, an alcohol-related felony resulting in injury to others, is very serious. Nevertheless, petitioner’s conduct during probation, corroborated by the testimony of colleagues and of petitioner’s probation monitor, and by documentation, and petitioner’s intensive rehabilitative efforts and over six years of sobriety, have been sufficient for him to demonstrate rehabilitation. He has benefitted from psychotherapy and court-ordered community service, and uses himself as an example when teaching residents and students. Given his ability to practice safely, removal of petitioner’s probationary status will again allow him to care for an underserved patient population. On this record, early termination of probation is justified.

ORDER

The petition of Joseph Nicholas Carey, Physician’s and Surgeon’s Certificate No. A 87082, for termination of probation, is granted.

DATED: July 11, 2019

DocuSigned by:
Howard W. Cohen
HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings